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Supreme Court, U.S.
FILED
FEB 9 - 2004
OFFICE OF THE CLERK

No. 03-821

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

FLORA HOLLAND, Warden,
*Petitioner*

v.

FRANK E. ADAMS,
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

Respondent Frank Adams respectfully moves this Court to proceed *in forma pauperis*. In the lower courts, Frank Adams was found to be indigent and was appointed counsel under 18 U.S.C. §3006A. His motion to proceed *in forma pauperis* should be granted.

Respectfully Submitted,

Paul R Bottei

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion to proceed *in forma pauperis* has been served via first-class mail postage prepaid upon Gordon Smith, Counsel for the Respondent, Office of the Attorney General, State of Tennessee, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 9th day of February, 2004.

Paul R Bottei

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# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Should this Court should grant certiorari to review the interlocutory order of the court of appeals which holds that petitioner's *Bruton* claim was properly exhausted in accordance with Tennessee procedural law, and which vacated and remanded for further proceedings?

2. Should this Court grant certiorari where the court of appeals applied to the facts a rule of law on which the circuits all agree, *viz.* a state court can promulgate a rule identifying what remedies are "available" for purposes of exhaustion under 28 U.S.C. §2254?

3. Should this Court grant certiorari to interpret and apply Tennessee Supreme Court Rule 39 where the court of appeals applied the law to the facts; where the court of appeals is in a unique, favored position to interpret and apply Tennessee law; where Petitioner raises facts and issues for the first time in this Court; and where the court of appeals' interpretation and application of Rule 39 was correct in light of the express terms of Rule 39, its preamble, and the policy which it embodies?

4. Is Frank Adams entitled to federal habeas review of his *Bruton* claim?

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## STATEMENT OF FACTS

Frank Adams was convicted of first-degree murder based upon the custodial statement of Timothy Crowell, a nontestifying co-defendant who owned the murder weapon but claimed in his statement that Frank Adams shot the victim. On direct appeal to the Tennessee Court of Criminal Appeals, Frank Adams asserted that the jury's consideration of Crowell's statement violated his right to confrontation under Bruton v. United States, 391 U.S. 123 (1968). The Tennessee Court of Criminal Appeals denied this claim, and Frank Adams did not specifically request, pursuant to Tenn.R.App.P. 11, that the Tennessee Supreme Court review that claim a second time.

After pursuing state post-conviction remedies, Frank Adams then raised his *Bruton* claim in a federal petition for writ of habeas corpus. The United States Magistrate initially concluded that admission of Crowell's unconfronted custodial statement violated *Bruton*, leaving for resolution the question whether the error was harmless. As the Magistrate explained:

> Crowell was in custody for a serious crime, 'made his statement[] under the supervision of governmental authorities,' and 'had a natural motive to attempt to exculpate himself as much as possible'. . . Consequently, the Magistrate Judge believes Crowell's statement to be unreliable and the admission thereof violative of Petitioner's Confrontation Clause right.

Supp.App. 21. The District Judge, however, overruled the Magistrate and dismissed the claim as procedurally barred. App. 47.

On June 28, 2001, the Tennessee Supreme Court promulgated Tenn.S.Ct. R. 39 in order to "clarify" Tennessee law whether second-tier review in the Tennessee Supreme Court has been necessary to exhaust state remedies under 28 U.S.C. §2254(b) & (c). In Rule 39, the Tennessee Supreme Court made clear that as to "*all appeals* from criminal convictions or post-conviction relief matters from and after July 1, 1967," "when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have

exhausted all available state remedies available for that claim." Tenn.S.Ct.R. 39. See App. 68-69.

In light of Rule 39, the Sixth Circuit granted Frank Adams a certificate of appealability on his *Bruton* claim and ultimately concluded that the District Court erred in holding that the claim was unexhausted and therefore procedurally defaulted. In reaching this conclusion the Sixth Circuit explained: (1) The Tennessee Supreme Court could properly promulgate a rule declaring whether second-tier appellate review in the state supreme court was necessary to exhaust state remedies (App. 5-10); and (2) Adams' claim is not unexhausted, because Tennessee law (as expressed in Rule 39) had not required him to seek discretionary review in the Tennessee Supreme Court following the Court of Criminal Appeals' denial of the *Bruton* claim. App. 10-14. The Sixth Circuit vacated the District Court's judgment and remanded for further proceedings on the merits of the *Bruton* claim. App. 17.

## REASONS THE PETITION SHOULD BE DENIED

The petition should be denied for no fewer than five reasons: (1) The case is in an interlocutory posture; (2) There is no conflict among the circuits concerning whether a state court can identify "available" remedies for purposes of exhaustion; (3) Petitioner is thus only asking this Court to apply a properly stated principle of law to the unique facts of this case; (4) Institutionally, this Court is in a worse position to interpret Tennessee law, which is best left to the Sixth Circuit; and (5) Even so, the Sixth Circuit's application of the law to the facts is unquestionably correct in light of the express terms of Rule 39 and the state policy which it expresses.

### I.
### THIS CASE COMES TO THE COURT IN AN INTERLOCUTORY POSTURE

The court of appeals below vacated the denial of habeas relief and remanded the case for

further proceedings. App. 17. Thus, there is no final judgment in the lower courts on Frank Adams' petition for writ of habeas corpus.[1] Given the remand to the district court and the lack of a final judgment in the lower courts, this case comes to the court in an interlocutory posture: Certiorari should thus be denied.

As Justice Scalia has recognized: "We generally await a final judgment in the lower courts before exercising our certiorari jurisdiction." Virginia Military Institute v. United States, 508 U.S. 946 (1993)(Scalia, J., concurring). Thus, where a court of appeals has remanded a case to the United States District Court, the case "is not yet ripe for review by this Court." Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967)(per curiam) (denying certiorari where "the court of appeals remanded the case."); Virginia Military Institute, 508 U.S. at 946 (Scalia, J., concurring)(certiorari denied where court of appeals vacated the judgment and remanded the case to district court); See American Construction Company v. Jacksonville, Tampa & Key West Railway Co., 148 U.S. 372, 384 (1893)(certiorari is not appropriate to review a case in an interlocutory posture except when "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

Given the interlocutory posture of the case, therefore, certiorari should be denied – especially where certiorari is unwarranted for numerous other reasons, explained *infra*. See also Columbia Union College v. Clark, 527 U.S. 1013, 1015 (1999)(Thomas, J., dissenting)(noting that certiorari was denied "perhaps because this case comes to us in an interlocutory posture."); Harris v. United States, 404 U.S. 1232, 1235 (1971) (Douglas, J.)(noting that certiorari was denied with "the

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[1]With Petitioner Holland having not requested a stay of the mandate, the District Court has already undertaken further proceedings concerning Frank Adams' pending *Bruton* claim. See e.g., Adams v. Holland, No. 3:99-0519 (M.D.Tenn.), R. 49, R. 50, R. 51.

interlocutory posture of the case" possibly being the "determining factor.")

## II.
## THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING A STATE COURT'S ABILITY TO STRUCTURE ITS OWN COURT SYSTEM AND IDENTIFY AVAILABLE REMEDIES FOR PURPOSES OF EXHAUSTION

As the Sixth Circuit correctly recognized, "*[E]very* other lower court that has considered, post-*O'Sullivan*, the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted." App. 10. Indeed, like the Sixth Circuit below, the Third, Eighth, and Ninth Circuits have recognized that states may identify second-tier review in a state supreme court as being "unavailable" for purposes of exhaustion. Wenger v. Frank, 266 F.3d 218 (3d Cir. 2001); Randolph v. Kemna, 276 F.3d 401 (8th Cir. 2002); Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999).

That the circuits are unanimous is not surprising, given this Court's pronouncement in O'Sullivan v. Boerckel, 526 U.S. 838 (1999) that "there is nothing in the exhaustion doctrine requiring the federal courts to ignore a state law or rule providing that a given procedure is not available." Id. at 847-848. Comity and federalism underlie the exhaustion doctrine, and those interests would be expressly *disserved* if federal courts were allowed to ignore a state court's identification of available remedies under state law – as Tennessee has done through Rule 39. Indeed, "It would be a strange rule of federalism that ignores the view of the highest Court of a State as to the meaning of its own law." Stringer v. Black, 503 U.S. 222, 235 (1992).

The lower courts have thus unanimously – and properly – recognized the principle that federal courts are obligated to defer to state rules describing available state remedies for purposes of exhaustion. Because the lower courts are not in conflict, there is no "compelling reason"

(U.S.S.Ct.R. 10) to grant certiorari and the petition should be denied. See U.S.S.Ct.R. 10(c).

## III.
## PETITIONER IS MERELY REQUESTING APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE UNIQUE FACTS OF THIS CASE

In the absence of a conflict among the circuits, Petitioner instead asks this Court to decide two issues concerning the Sixth Circuit's application of *O'Sullivan v. Boerckel* to Tennessee Supreme Court Rule 39. See Petition For Writ Of Certiorari, p. i. As noted *supra*, however, there is no lower court conflict concerning the propriety of a state court promulgating a rule identifying second-tier review as "unavailable," and in fact, the promulgation of such rules is permitted by *O'Sullivan*. The petition thus boils down to a request that this Court evaluate Tennessee law as expressed in Rule 39 and *O'Sullivan* to decide: (1) whether the Sixth Circuit misapplied the "unavailablility" principle of 28 U.S.C. §2254(c) and *O'Sullivan* to conclude that Rule 39 is unavailable (Question #1) and (2) whether the Sixth Circuit's application of Rule 39 to Frank Adams' claim was improper (Question #2). Indeed, even the petition specifically makes clear that it questions "the Sixth Circuit's application of" Rule 39. See Petition, p. 15.

Such alleged misapplication of a unanimously applied legal principle to the unique facts of this case does not provide a basis for granting certiorari. U.S.S.Ct.R. 10 (alleged misapplication of properly stated rule of law not basis for certiorari). This is so, especially where (as explicated *infra*) the Sixth Circuit decision is correct (See *infra*, pp. 7-10), and the Sixth Circuit thus did not "patently err" in concluding that under Tennessee law, since 1967, second-tier review in the Tennessee Supreme Court has not been required under Tennessee law. See Kyles v. Whitley, 514 U.S. 419, 457, 458 (1995)(Scalia, J., dissenting). Thus, this Court should deny certiorari, as it has previously when

a court of appeals has applied a state court rule such as Rule 39 to the specific facts of particular case. See e.g., Wenger v. Kyler, 535 U.S. 957 (2002).

## IV.
## INSTITUTIONALLY, THIS COURT MUST PROPERLY DEFER TO THE COURT OF APPEALS' INTERPRETATION AND APPLICATION OF TENNESSEE LAW, AND PETITIONER IS IMPROPERLY ASKING THIS COURT TO REVIEW, IN THE FIRST INSTANCE, VARIOUS ASPECTS OF TENNESSEE LAW

Just as the federal courts must defer to state rules governing exhaustion, this Court must properly defer to the court of appeals' interpretation and application of Tennessee law. As an institutional matter, where interpretation of state law is at issue, this Court has a "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law."DeBuono v. NYSA-ILA Medical And Clinical Services Fund, 520 U.S. 806, 810 n. 5 (1997); Mills v. Rogers, 457 U.S. 291 (1982)(noting that court of appeals was "better situated than we to determine" status of state law); Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980)(noting deference to court of appeals which was "more familiar than we with state law.").

This is especially true in cases involving questions about state procedures necessary to preserve claims for federal habeas review: In such cases, this Court has not hesitated to acknowledge that the court of appeals is better situated to resolve the nuances of state procedural law. Selvage v. Collins, 494 U.S. 108, 110 (1990)(per curiam)(remanding to court of appeals for interpretation of Texas' procedural bar rules, because "The Court of Appeals for the Fifth Circuit is more familiar with Texas law than we are."); Rummel v. Estelle, 445 U.S. 263, 267 n. 7 (1980)(deferring to the court of appeals' interpretation of Texas law concerning existence of procedural default).

Adherence to this principle of restraint is especially compelling here, where Petitioner is asking that this Court decide the issues by considering arguments based on numerous Tennessee

rules,[2] a Tennessee Advisory Committee note,[3] and several reports[4] – none of which were presented or argued to the lower courts. Not only are such matters waived because they were never presented to the lower courts, it is clear that this Court is not an appropriate forum for interpreting *in the first instance* myriad state court rules and studies which Petitioner failed to present or argue to the court of appeals. See Equal Employment Opportunity Commission v. Federal Labor Relations Board, 476 U.S. 19 (1986)(certiorari dismissed where petitioner's arguments not properly presented to lower courts and failure brought to attention in brief in opposition). The petition should be denied.[5]

V.

THE SIXTH CIRCUIT'S INTERPRETATION AND APPLICATION OF TENNESSEE LAW IS UNQUESTIONABLY CORRECT: BY ITS EXPRESS TERMS, RULE 39 APPLIES TO ALL CASES SINCE 1967; PETITIONER'S CONTRARY INTERPRETATION OF TENNESSEE LAW IGNORES THE EXPRESS TERMS OF RULE 39, DISSERVES COMITY, AND TURNS THE POLICY OF THE STATE OF TENNESSEE ON ITS HEAD

Fundamentally, the court of appeals' interpretation and application of Rule 39 to Frank Adams' case was correct, for several salient reasons:

1. By its express terms, Rule 39 announces what Tennessee procedure has been since

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[2] See e.g., Tenn.R.App. 3 (Petition, p. 10), Tenn.R.App. 11 (Petition, p. 10), Tenn.S.Ct.R. 13 (Petition, p. 12), Tenn.S.Ct.R. 14 (Petition, pp. 12-13), Tenn.S.Ct.R. 28 (Petition, p. 13). See Petition, Table Of Contents, p. v.

[3] Tenn.S.Ct.R. 39 Advisory Committee Notes (Petition, pp. 11-12).

[4] Petition, p. 12.

[5] In addition, the Honorable Martha Craig Daughtrey sits on the Sixth Circuit, and she served on both the Tennessee Court of Criminal Appeals (for 15 years) *and* the Tennessee Supreme Court (for 3 years). It is thus "rather sensible" to defer to the judgment of the court of appeals on this issue of state law. Compare Salve Regina College v. Russell, 499 U.S. 225, 241 (1991)(Rehnquist, C.J., dissenting)("rather sensible" for court of appeals to give some deference to district judge with 18 years of experience with state law and practice).

1967: No application for permission to appeal has been required for any claim presented in "all appeals" since 1967. Rule 39 explicitly applies to:

> *all appeals* from criminal convictions or post-conviction relief matters *from and after July 1, 1967*, [the date the Tennessee Court of Criminal Appeals was established]

App. 68. The Rule further provides that when a claim has been presented to the Tennessee Court of Criminal Appeals, that claim is deemed exhausted. Id. Petitioner's assertion that Tennessee law required an application for permission to appeal for in 1993 completely overlooks the operative "all appeals . . . from and after July 1, 1967" language, which establishes that Rule 39 expresses what Tennessee law has always been. For Petitioner to claim that Frank Adams' case is not embraced by the phrase "all appeals . . . from and after July 1, 1967" is to render that phrase meaningless.

Needless to say, one cannot read operative language out of a state rule without misinterpreting that rule and offending comity as a result. Petitioner ignores the "all appeals . . . from and after July 1, 1967" language. The court of appeals has not. App. 12 (discussing express language contained in Rule 39). The court of appeals is thus correct, and Petitioner's contrary interpretation is wrong, as it flies in the face of settled principles that a statute or rule must be interpreted according to its plain meaning,[6] operative terms must be given effect, and terms may neither be ignored nor rendered meaningless.[7]

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[6] Alabama v. Bozeman, 533 U.S. 146 (2001)(courts must apply rules and statutes literally); Moskal v. United States, 498 U.S. 103 (1990)(courts must apply statutory language by its plain meaning); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)(where language of rule or statute is plain, courts must enforce it according to its terms); United States v. Rodgers, 466 U.S. 475, 484 (1984); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); Caminetti v. United States, 242 U.S. 470, 485 (1917).

[7] TRW v. Roberts, 534 U.S. 19 (2001)(cardinal principle of construction is that no clause, sentence or word should be rendered superfluous, void, or insignificant); Duncan v. Walker, 533 (continued...)

2. The Tennessee Supreme Court has stated that Rule 39 merely "clarifies" what state law has been since before the promulgation of Rule 39. Indeed, the Tennessee Supreme Court has explicitly stated that Rule 39 was promulgated to clarify existing Tennessee practice. According to the Tennessee Supreme Court, Rule 39 was promulgated:

> to *clarify* that denial of relief by the Court of Criminal Appeals shall constitute exhaustion for federal habeas corpus purposes.

See App 68. As this Court has made manifest, a state ruling which "merely clarifie[s]" state law is "not new law" and therefore must be applied to a habeas petitioner's case. Fiore v. White, 531 U.S. 225, 228 (2001)(granting habeas relief by applying intervening decision of state supreme court which, according to state supreme court, merely clarified state law). That is the case here with Rule 39. Under Fiore, with the court of appeals having recognized that Rule 39 clarifies existing law (App. 13), the court of appeals' application of Rule 39 to Frank Adams' case was manifestly correct, and Petitioner's claims of "nonretroactivity" necessarily fail.

3. Finally, Petitioner's proposed interpretation of Rule 39 fails to come to grips with the purpose of the 1967 date contained in Rule 39. The Tennessee Court of Criminal Appeals was created in 1967 for the express purpose of "reduc[ing] the appellate backlog in criminal cases." App. 68. As the Tennessee Supreme Court has made clear in Rule 39, the Court of Criminal Appeals was not created to require two-tier review of every claim in every criminal or post-conviction case, but

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[7](...continued)
U.S. 167, 174 (2001)("Were we to adopt respondent's construction of the statute, we would render the word "State" insignificant, if not wholly superfluous. 'It is our duty to give effect, if possible to every clause and words of a statute.")(internal quotations omitted); Williams v. Taylor, 529 U.S. 362, 404 (2000)(O'Connor, J., concurring); United States v. Menasche, 348 U.S. 528, 538-539 (1955); Inhabitants of Montclair Township v. Ramsdell, 107 U.S. 147, 152 (1883); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(proper interpretation of statute requires that no clause, sentence, or word be rendered superfluous, void, or insignificant).

for the precise opposite reason: To reduce the workload of the Tennessee Supreme Court. Petitioner's novel interpretation of Tennessee law proposes a completely contrary (and unsupported) view of Tennessee law, *viz.*, that the Court of Criminal Appeals was created to increase the workload of the Tennessee courts by requiring the Tennessee courts to review every claim in every criminal case not simply once, but twice.

In other words, if Petitioner were correct that Tennessee law required second-tier appellate review of all claims in all cases since 1967, by creating the Court of Criminal Appeals to hear appeals, the Tennessee Legislature necessarily desired two – not one – appeals of every claim in every case: One to the Court of Criminal Appeals accompanied (at least) by an application to the Tennessee Supreme Court. This has never been the policy of Tennessee. On the contrary, since1967, state policy has been exactly the opposite – to relieve the burden on the Tennessee Supreme Court by not requiring that court to review issues already reviewed once. App. 68. Petitioner's contrary interpretation of Rule 39 thus turns the express policy of Tennessee – fully expressed in the preamble to Rule 39 and Rule 39 itself – on its head.

In sum, as the court of appeals held, Rule 39 clarifies existing Tennessee law. Rule 39 expresses Tennessee policy since 1967, and by its express terms, it applies to all cases in which appeals have been filed since 1967. The court of appeals' interpretation and application of Tennessee law is manifestly correct – not only given the plain text of the Rule, but given the longstanding Tennessee policy embodied by Rule 39. Frank Adams is entitled to plenary review of his *Bruton* claim for these reasons, and all reasons contained in the record. Certiorari should be denied.

## CONCLUSION

Petitioner asks this Court to review an interlocutory order concerning an interpretation and

application of state law, where the court of appeals was uniquely able to apply state law, and where nuances of Tennessee law were never presented or argued below. There is no conflict among the circuits, and the court of appeals' application of law is not only not clearly in error, it is correct. The petition for writ of certiorari should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief in opposition has been served via first-class mail postage prepaid upon Gordon Smith, Counsel for the Respondent, Office of the Attorney General, State of Tennessee, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 9th day of February, 2004.